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5                   UNITED STATES DISTRICT COURT  
6                   WESTERN DISTRICT OF WASHINGTON  
7                   AT TACOMA

8 EQUAL EMPLOYMENT  
9 OPPORTUNITY COMMISSION,

10                   Plaintiff,

11                   v.

12 FOOT LOCKER RETAIL, INC., a  
13 subsidiary of FOOT LOCKER, INC.,

14                   Defendant.

CASE NO. C07-5472BHS

ORDER GRANTING  
DEFENDANT'S MOTION  
FOR ENTRY OF JUDGMENT  
ON THE VERDICT AND  
DENYING PLAINTIFF'S  
MOTION FOR NEW TRIAL

14                   This matter comes before the Court on Plaintiff's motion for a new trial (Dkt. 98)  
15 and Defendant's motion for entry of judgment on the verdict (Dkt. 97).

16                   **I. BACKGROUND**

17                   On April 3, 2009, following a nine-day trial, the jury returned a verdict form which  
18 found no liability on the part of Defendant Foot Locker Retail, Inc. ("Foot Locker") on all  
19 of Plaintiff Equal Employment Opportunity Commission's ("EEOC") claims. Dkt. 14  
20 (verdict form) (Questions 1 through 5). However, the jury also found that each claimant  
21 was entitled to punitive damages. *Id.* at 14 (Questions 6, 7, and 8).<sup>1</sup>

22                   The verdict form was organized as follows: Questions 1 through 3 addressed the  
23 three hostile work environment sexual harassment claims that EEOC alleged on behalf of

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<sup>1</sup> The parties stipulated to use of the verdict form for Questions 1 through 5. See Dkt. 59,  
26 42-51 (joint proposed verdict form). Foot Locker opposed submission of Questions 6 through 8  
27 on the grounds that EEOC had no evidence that Foot Locker acted with malice or reckless  
28 disregard. See Dkt. 59-2, 15-17 (joint statement of disputed instructions). The Court granted  
EEOC's request to submit Questions 6 through 8 to the jury.

1 the three claimants; Question 4 addressed the retaliation claim that EEOC alleged on  
2 behalf of claimant Rebecca Anderson Leonard for Foot Locker's failure to return Ms.  
3 Leonard to the Tacoma Mall Kids Foot Locker store; Question 5 addressed the retaliation  
4 claim that EEOC alleged on behalf of Ms. Leonard based on the termination of Ms.  
5 Leonard's employment; and Questions 6 through 8 addressed punitive damages for the  
6 respective claimants. *Id.*

7 Jury Instruction No. 22 defined punitive damages. Dkt. 92 at 23.

8 **A. QUESTIONS 1 THROUGH 5**

9 First, after finding that Foot Locker subjected Ms. Leonard to unwelcome sexual  
10 advances (Questions 1(a) and 1(b)), the jury provided the following answer on the verdict  
11 form:

12 1. (c) Was the conduct sufficiently severe or pervasive to alter the  
13 conditions of Rebecca Anderson Leonard's employment and create a  
sexually abusive or hostile work environment? [Answer:] No.

14 *If your answer to Question 1(c) is "yes," proceed to 1(d). If it is  
"no," please proceed to Question 2. You need not answer questions 1(d)-  
(i).*

15 Dkt. 93, 1-2 (verdict form) (emphasis in original).

16 The jury did not answer Questions 1(d)-(i). The jury provided identical answers for  
17 the two hostile work environment sexual harassment claims that the EEOC alleged on  
18 behalf of claimants Rachel Anderson (*see* Question 2, *id.*, 4-6) and Shamaleca Taylor (*see*  
19 Question 3, *id.*, 7-9). The jury did not answer Questions 2(d)-(i) or 3(d)-(i).

20 Second, the jury found that Foot Locker did not subject Ms. Leonard to adverse  
21 employment actions by not returning her to the Tacoma Mall Kids Foot Locker store (*see*  
22 Question 4(b), *id.* at 10) or by terminating her employment (*see* Question 5(b), *id.* at 12).  
23 Question 4(b) instructed the jury: "If your answer to Question 4(b) is 'yes,' proceed to  
24 4(c). If it is 'no,' please proceed to Question 5. You need not answer questions 4(c)-(f)." *Id.*  
25 at 10. The jury did not provide answers for Questions 4(c) through (f). *Id.*, 10-11.

26 Question 5 was the final question regarding EEOC's liability claims. Question 5(b)  
27 instructed the jury as follows: "If your answer to Question 5(b) is 'yes,' proceed to 5(c). If  
28

1 it is ‘no,’ you need not answer any additional questions.” *Id.* at 12. The jury did not  
2 provide answers for Questions 5(c) through (f). *Id.*, 12-13. However, the jury proceeded  
3 to answer Questions 6, 7, and 8.

4 **B. QUESTIONS 6 THROUGH 8**

5 The jury provided the following answers to the verdict form questions regarding  
6 punitive damages:

7 **Question 6:** Did Defendant act with malice or reckless disregard for  
Rebecca Anderson Leondard’s federally protected rights? If so, please  
indicate the monetary amount to which she is entitled: [Answer:] \$60,000.00

8 **Question 7:** Did Defendant act with malice or reckless disregard for  
Rachel Anderson’s federally protected rights? If so, please indicate the  
monetary amount to which she is entitled: [Answer:] \$35,000.00

9 **Question 8:** Did Defendant act with malice or reckless disregard for  
Shamaleca Taylor’s federally protected rights? If so, please indicate the  
monetary amount to which she is entitled: [Answer:] \$5,000.00

10 *Id.* at 14.

11 **C. PUNITIVE DAMAGES JURY INSTRUCTION**

12 The jury instruction regarding punitive damages read:

13 **Instruction No. 22**

14 If you find for the plaintiff, you may, but are not required to,  
award punitive damages. The purposes of punitive damages are not to  
compensate a plaintiff, but to punish a defendant and to deter a  
defendant and others from committing similar acts in the future.

15 The plaintiff has the burden of proving that punitive damages  
should be awarded, and the amount, by a preponderance of the  
evidence. You may award punitive damages only if you find that the  
defendant’s conduct was malicious, oppressive or in reckless  
disregard of the claimants’ rights. Conduct is malicious if it is  
accompanied by ill will, or spite, or if it is for the purpose of injuring  
another. Conduct is in reckless disregard of the claimants’ rights if,  
under the circumstances, it reflects complete indifference to the  
claimants’ safety or rights, or the defendant acts in the face of a  
perceived risk that its actions will violate the claimants’ rights under  
federal law. An act or omission is oppressive if the person who  
performs or fails to perform it injures or damages or otherwise  
violates the rights of the claimants with unnecessary harshness or  
severity, such as the misuse or abuse of authority or power of by the  
taking advantage of some weakness or disability or misfortune of the  
claimants.

16 If you find that punitive damages are appropriate, you must use  
reason in setting the amount. Punitive damages, if any should be in an  
amount sufficient to fulfill their purposes but should not reflect bias,  
prejudice or sympathy toward any party. In considering punitive  
damages, you may consider the degree of reprehensibility of the

1 defendant's conduct and the relationship of any award of punitive  
2 damages to any actual harm inflicted on the claimants.

3 Punitive damages may be awarded even if you award  
4 claimants only nominal, and not compensatory, damages.

5 Dkt. 92 at 23 (Jury Instruction No. 22).

6 **D. DISCHARGE OF JURY**

7 After the jury returned the verdict, the Court excused the jury and heard argument  
8 from the parties. Dkt. 96 (transcript). Foot Locker moved the Court to enter the verdict in  
9 its favor and disregard the jury's award of punitive damages because such damages are  
10 unavailable absent liability. The EEOC moved the Court to send the verdict form back to  
11 the jury "to have them reevaluate, or maybe with some guidance about the basis of the  
12 punitive damages." *Id.* at 6:1-4. The Court reconvened the jury and the jurors were polled.  
13 The Court subsequently discharged the jury and requested additional briefing from the  
14 parties.

15 **E. PENDING MOTIONS**

16 On April 15, 2009, Foot Locker filed a motion for entry of judgment on the  
17 verdict. Dkt. 97. Foot Locker contends that there is no inconsistency in the verdict  
18 because the jury "rejected each of the EEOC's liability theories because of a specific  
19 missing element." *Id.* at 4. Foot Locker also contends that the jury responses can be  
20 reconciled because it was not provided a proper "stop sign" instructing it that Questions 6  
21 through 8 must not be answered unless the jury has found liability under one or more of  
22 the claims addressed in Questions 1 through 5. Alternatively, Foot Locker argues that if  
23 Question 5(b) is construed as a "stop sign," the Court must disregard the jury's punitive  
24 damage award entered in violation of the stop sign.

25 On April 15, 2009, EEOC filed a motion for new trial. Dkt. 98. EEOC contends  
26 that the Court must order a new trial because the verdict was internally inconsistent and  
27 cannot be harmonized. EEOC first argues that the award of punitive damages are  
28 inconsistent with the jury's finding of no liability because Jury Instruction No. 22  
instructs the jury that punitive damages may be awarded if the jury "find[s] for the

1 plaintiff,” and the verdict form required the jury to find that Foot Locker acted with  
2 malice or reckless disregard for the claimants’ federally protected rights. EEOC maintains  
3 that the inconsistency should have been addressed by providing the jury with an  
4 explanatory instruction and ordering further deliberations. On April 22, 2009, both parties  
5 filed responses. Dkts. 100 (Defendant’s response) and 101 (Plaintiff’s response).

6 **II. DISCUSSION**

7 “When confronted with seemingly inconsistent answers to the interrogatories of a  
8 special verdict, a court has a duty under the Seventh Amendment to harmonize those  
9 answers, if such is possible under a fair reading of them.” *Floyd v. Laws*, 929 F.2d 1390,  
10 1396 (9th Cir. 1991) (*citing Gallick v. Baltimore & O.R.R. Co.*, 372 U.S. 108, 119  
11 (1963)). This duty involves a “search for a reasonable way to read the verdicts as  
12 expressing a coherent view of the case, and . . . [t]he consistency of the jury verdicts must  
13 be considered in light of the judge’s instructions to the jury.” *El-Hakem v. B.J.Y Inc.*, 415  
14 F.3d 1068, 1074 (9th Cir. 2005).

15 When a jury has completed a special verdict form, “inconsistencies are  
16 problematic and require a new trial only if they arise between two or more factual  
17 findings; otherwise, the determination of liability can simply be conformed to the factual  
18 findings.” *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003). If  
19 a jury has been discharged, only in the case of a “fatal inconsistency” may a court order a  
20 new trial.<sup>2</sup> *See Floyd*, 929 F.2d at 1396; *see also Anheuser-Busch, Inc. v. John Labatt*  
21 *Ltd.*, 89 F.3d 1339, 1346 (8th Cir. 1996) (the duty to harmonize inconsistent verdicts  
22 requires viewing the case in any reasonable way that makes the verdicts consistent)  
23 (*citing Gallick*, 372 U.S. at 119).

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27 <sup>2</sup> After excusing the jury, the Court stated on the record that the verdict was “internally  
28 inconsistent.” Dkt. 96:8-10. A better description would have been to state that the verdict  
contained an “apparent inconsistency.”

1 Foot Locker has provided two reasonable ways to read the jury's verdict, and the  
2 Court concludes that under either view, the jury's verdict is reconcilable.

3 **A. FREEMAN VIEW**

4 The Court finds the Seventh Circuit case, *Freeman v. Chi. Park Dist.*, 189 F.3d  
5 613 (7th Cir. 1999), persuasive in resolving this case. In *Freeman*, the plaintiff brought  
6 Title VII and § 1981 racial discrimination claims. The jury returned special verdict forms,  
7 finding that (1) the defendant school district had harassed the plaintiff, (2) race was not  
8 one of the reasons behind the harassment, (3) race was not one of the reasons the school  
9 district discharged the plaintiff, and (4) the school district did not retaliate against the  
10 plaintiff for her complaints of discrimination. *Freeman*, 189 F.3d at 615. The jury then  
11 elected to award the plaintiff damages as a result of the school district's harassment,  
12 termination, and/or retaliation. *Id.* The district court set aside the jury's award of punitive  
13 damages, and the plaintiff appealed.

14 The *Freeman* court first addressed the respective roles of the Court and the jury  
15 when special verdict forms<sup>3</sup> are used. The *Freeman* court recognized that special verdicts  
16 fulfill a "far more limited role" than general verdicts:

17 "Under Rule 49(a) [of the Federal Rules of Civil Procedure],  
18 governing procedure involving special interrogatories or special verdicts, the  
19 trial judge has the responsibility of applying appropriate legal principles to  
the facts found by the jury; it is for the court to decide upon the jury's  
answers, the jury's special verdicts, what the resulting legal obligation is."  
*Theedorf v. Lipsey*, 237 F.2d 190, 193 (7th Cir.1956); *see also United States*  
v. *Kim*, 111 F.3d 1351, 1362 (7th Cir.1997). Thus, the term "damages" in the  
context of a special verdict has more limited meaning than in a general  
verdict: It refers only to the loss suffered by the plaintiff, a question of fact.  
The legal conclusion, that the defendant is liable for the amount of the loss,  
will depend on the judge's application of the law to the facts as they are  
found by the jury. *See generally* Wright & Miller, 9A Federal Practice &

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24       <sup>3</sup> It is not entirely clear whether the parties agree that the jury used special verdict forms,  
25 as opposed to a general verdict form with written questions, *see Fed. R. Civ. P. 49(b)*. The Court  
26 finds that the verdict forms meet the definition of a special verdict as set out in the Federal Rules  
of Civil Procedure. *See Fed. R. Civ. P. 49(a)*. In addition, the Court finds that the *Gallick* rule  
27 requiring the Court to attempt to harmonize governs here. *See Grosvenor Properties*, 896 F.2d at  
1151 (finding that Fed. R. Civ. P. 49(b) governs inconsistencies in special verdicts, and applying  
the *Gallick* rule).

1 Procedure § 2510, n. 13 & text accompanying (1995 & Supp. 1999) (*citing*  
2 *Theedorf*, 237 F.2d 190).

3 *Freeman*, 189 F.3d at 616.

4 The *Freeman* court then affirmed the district court's decision to disregard the  
5 damages award:

6 With this distinction in mind, it seems evident that the jury's verdict  
7 is not inconsistent. The jury found that the plaintiff was harassed  
8 (apparently for reasons other than those protected by Title VII), and  
9 suffered damages, or a loss, in the amount of \$45,000. However, the judge  
10 must enter judgment for the defendant, because the jury found that the  
11 harassment was not motivated by racial prejudice, and therefore, the  
12 plaintiff did not establish a Title VII violation. As the award of damages in  
the context of a special verdict does not imply a finding of all the essential  
elements of the claim, the district court erred in concluding that the verdict  
was inconsistent, and in striking the jury's answer to Question No. 5.  
However, the special verdict does not entitle Freeman to a judgment  
because the harassment for which the jury awarded damages was not  
motivated by racial discrimination. Therefore we affirm the district court on  
this issue.

13 *Id.* at 616.

14 Similarly, in this case, the jury made factual determinations that preclude this  
15 Court from finding that, as a matter of law, Foot Locker is liable as to any of EEOC's  
16 claims. While this case differs from *Freeman* in that the jury here awarded punitive  
17 damages, as opposed to actual damages, and made the additional factual determination  
18 that Foot Locker acted with "malice or reckless disregard for [each claimants'] federally  
19 protected rights," the outcome must be the same. As a matter of law, EEOC is not entitled  
20 to punitive damages because the jury found missing elements as to each of the five  
21 substantive claims in this case.

22 EEOC argues that the verdict cannot be harmonized because, in light of Jury  
23 Instruction No. 22 and Verdict Form Questions 6 through 8, the jury must have intended  
24 to "find for the plaintiff as to the claims set out in the instructions." Dkt. 101 at 3. EEOC  
25 further maintains that "by awarding punitive damages, the Jury found for Plaintiff on  
26 liability." *Id.* at 5.

1       While EEOC persuasively argues that by awarding damages the jury must have  
2 found that Foot Locker is liable, EEOC has not shown that the verdict is fatally  
3 inconsistent. Most importantly, the jury made factual findings as to the substantive claims  
4 in this case by answering Questions 1 through 5 and found missing elements. The Court  
5 must assume that the jury correctly marked these forms. *Floyd*, 929 F.2d at 1399.  
6 Assuming each answer is correctly marked, the Court must then “try to explain the  
7 apparent inconsistency in light of the jury instructions and the special verdict as a whole.”  
8 *Id.* Similarly to the court’s findings in *Floyd*, there are several plausible explanations for  
9 this verdict. First, the jury may have misunderstood the Court’s instructions regarding  
10 punitive damages. *See id.* It may have viewed punitive damages as a separate claim, and  
11 found that while none of the elements of the actual five claims were satisfied, Foot  
12 Locker nonetheless acted maliciously or recklessly as to the claimants’ federally  
13 protected rights. The Court notes that the term “federally protected rights” may have been  
14 interpreted by the jury to encompass something different than the rights addressed in  
15 EEOC’s five claims. The Court further notes that Questions 6 through 8 did not  
16 specifically mention any of the five claims, nor did the questions reference any of the  
17 elements of the alleged claims.

18       Second, the jury may not have understood that, as a matter of law, punitive  
19 damages are not available absent a finding of liability. *See id.* The jury “may simply have  
20 wished to compensate [the claimants] as an act of charity,” *see id.*, or the jury may have  
21 wanted to punish Foot Locker for actions it found contemptible, despite the missing  
22 elements of the substantive claims.

23 **B. FLOYD VIEW**

24       Under a second view, the jury verdict may be reconciled because the jury  
25 disregarded a “stop sign” by moving on to punitive damages after finding missing  
26 elements as to each of the five substantive claims. When a jury’s special verdict includes  
27 findings that disregard a trial court’s express instructions, the trial court must disregard

1 them as surplusage, as a matter of law. *Floyd*, 929 F.2d at 1397. This Court must consider  
2 the verdict in light of the instructions and the verdict form provided to they jury. *See El-*  
3 *Hakem, supra*. Here, a fair view of the jury’s verdict is that the jury disregarded “stop  
4 signs” provided by Jury Instruction No. 22, and by Verdict Form Question 5(b).

5 First, Jury Instruction No. 22 instructed the jury that it could award punitive  
6 damages “if [the jury] find[s] for the plaintiff.” Based on the jury’s answers to Questions  
7 1 through 5, the jury found that the elements of each of the five claims were not satisfied.  
8 Thus, the jury did not “find for the plaintiff” prior to moving on to Questions 6 through 8.  
9 Because Questions 1 through 5 addressed the specific elements of each of the five claims,  
10 while Questions 6 through 8 referred only generally to “federally protected rights,” the  
11 jury’s answers to Questions 1 through 5 must prevail.

12 Second, while Question 5(b) could be read as providing the jury discretion to move  
13 on to the punitive damages questions, the Court is satisfied that when read in conjunction  
14 with Jury Instruction No. 22, Question 5(b) provides an adequate (albeit imperfect) stop  
15 sign. Notably, the jury followed the “stop signs” in Questions 1 through 4, which  
16 instructed the jury that it “need not” answer the remaining subparts of the respective  
17 questions if it answered “no.” *See Dkt. 93, 1-11.*

18 Question 5(b) instructed the jury that it “need not answer *any additional*  
19 *questions*,” yet the jury went on to answer the punitive damages questions. *See id.* at 12  
20 (emphasis added). After following this stop sign by not answering Questions 5(c) through  
21 (f), the jury violated the stop sign by proceeding to answer Questions 6 through 8. While  
22 the Court recognizes that the jury could have exercised the discretion inferred from the  
23 term “need not,” the Court finds it significant that the jury reacted to each of the other  
24 stop-signs by not responding to subsequent questions. Additionally, the use of the term  
25 “need not” in Question 5 may have been used to permit the jury to answer “no” to  
26 subparts of Question 5, but allow the jury to proceed to the punitive damages questions in  
27 the event the jury had found liability in answering Questions 1 through 4. In other words,

had the jury found liability for sexual harassment in Questions 1 through 3, but found no liability for retaliation in Question 5, the jury could have proceeded to Questions 6 through 8, as directed by the punitive damages instruction.

#### C. COURT'S DECISION TO DISCHARGE THE JURY

The Court acknowledges that, prior to the Court's discharging of the jury, EEOC requested the resubmission of the verdict form to the jury with clarifying instructions. The Court recognizes that at least one Ninth Circuit case favors this practice when an apparent inconsistency exists. *See Duk v. MGM Grand Hotel, Inc.*, 320 F.3d 1052, 1058 (9th Cir. 2003). However, to the extent EEOC assigns error to the Court's denial of its request, and assuming this is part of the basis for their motion for a new trial, the Court concludes that it did not err. While *Duk* rejected the Fourth Circuit's position on this issue, which had determined resubmission to be an abuse of discretion, *see McCollum v. Stahl*, 579 F.2d 869 (4th Cir. 1978), *Duk* nonetheless recognized that a trial court has discretion whether to resubmit the verdict form to the jury for further deliberations when faced with an apparent inconsistency. *Id.* While upholding a trial court's resubmission, *Duk* did recognize the risk of a jury reaching an improper "compromise" verdict. *See id.* Such a risk was apparent in this case.

### III. ORDER

Therefore, it is hereby

**ORDERED** that Defendant's motion for entry of judgment (Dkt. 97) on the verdict is **GRANTED** and Plaintiff's motion for a new trial (Dkt. 98) is **DENIED**.

It is further **ORDERED** that pursuant to Fed. R. Civ. P. 58(b)(2)(B), judgment is entered against Plaintiff as to all claims, and the jury's award of punitive damages is set aside.

DATED this 28<sup>th</sup> day of April, 2009.



BENJAMIN H. SETTLE  
United States District Judge